IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

DAYTON RUBBER COMPANY, *Petitioner*

v.

CORDOVAN ASSOCIATES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP C. EBELING
PICKREL, SCHAEFFER AND EBELING
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, The Dayton Rubber Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on June 6, 1960.

OPINION BELOW

The District Court did not render an opinion. Its findings and conclusions were entered on May 6, 1959 (Appendix A, *infra*, pp. 1a-11a) and its order of declaratory judgment was filed June 8, 1959 (Appendix, B, *infra*, p. 12a). The opinion of the Circuit Court of Appeals (Appendix C, *infra*, pp. 13a-17a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960 (Appendix D, *infra*, p. 17a). A timely petition for a rehearing was denied on July 6, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

This was an action for a declaratory judgment instituted by the Dayton Rubber Company against Cordovan Associates, Incorporated, to resolve the question of whether or not Dayton, by reason of its contract with Cordovan, was required to accord to approved distributors of Cordovan, for the period from June 1, 1958 to the termination of the contract on October 31, 1958, the same prices that it accorded to its other chain store customer, White Stores, Inc. After a non-jury trial of two weeks duration, the trial judge held that Dayton was not so required. In the course of detailed findings, the trial judge found that:

> There was no provision, either oral or written, nor were there facts from which [illegible]erence could be drawn, that Cordovan prices were to be tied to White prices under all circumstances.

The Court of Appeals reversed the judgment of the trial court because it disagreed with that finding. It held that this was an inference or conclusion drawn from the facts with which it was free to disagree uninhibited by the clearly erroneous test of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following 723(c).

The sole question is whether the Court of Appeals erred in failing to apply to the finding above mentioned the clearly erroneous test of Rule 52.

RULE INVOLVED

Rule 52 of the Federal Rules of Civil Procedure [28 U.S.C.A.] provides in part as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT

The Dayton Rubber Company, petitioner herein is an Ohio corporation. It is a manufacturer, among other things, of automobile tires and tubes. On November 1, 1956, it entered into a contract with Cordovan Associates, Incorporated, a Virginia corporation, under which it agreed to manufacture and sell to customers approved by Cordovan Associates tires and tubes bearing the brand name Cordovan. Cordovan's approved customers were chain store operators of automotive retail businesses located throughout a large area of the United States. The contract was for a term of two years (November 1, 1956, to October 31, 1958), and required that Dayton sell Cordovan brand tires and tubes to the approved distributors at prices "prevailing on date of shipment." Sales were made to the various Cordovan distributors until the termination of the contract on

October 31, 1958. However, a dispute arose as to the prices Dayton could properly charge the various distributors for the items sold to them during the period from June 1, 1958 to October 31, 1958. Cordovan contended that the phrase "prices prevailing on date of shipment" entitled its distributors to the same prices Dayton charged its other chain store customer White Stores, Inc. Dayton contended that "prices prevailing on date of shipment" referenced a pricing formula and that it was free to enter into a new contract with White Stores without being under obligation to enter into a similar contract with Cordovan. Since there were numerous Cordovan distributors located in several different jurisdictions who owed Dayton large sums for tires and tubes sold to them during the period in question, Dayton, to avoid a multiplicity of suits, brought an action for a declaratory judgment to obtain a construction of the contract and a decision as to the rights and obligations of the parties under it.

After a non-jury trial of two weeks' duration, the trial judge made detailed findings of fact and entered judgment in favor of Dayton concluding that the prices charged Cordovan distributors by the rubber company were proper and in accordance with the contract between Dayton and Cordovan.

In brief, the trial judge found that from 1947 to 1956, the Dayton Rubber Company had sold tire casings and tubes through its chain store division to both White Stores, Inc., and the approved distributors of Cordovan Associates billing them on an identical "cost justification basis," though it had no written contract with either customer (Apdx. 3a). Fluctuations in prices, which generally came about quarterly,

were applied uniformly and identically to shipments going to both customers (Apdx. 3a).

In 1956, Dayton entered into a written contract with White Stores, Inc., for the sale of such tires and tubes. This contract was for a term of three years, commencing August 1, 1956 (Apdx. 4a). Thereafter, on November 1, 1956, it entered into a similar contract with Cordovan Associates for a term of two years (Apdx. 4a). The contract with Cordovan contained the following paragraph with regard to prices for tires and tubes purchased pursuant to such contract:

> 5. Price. Supplier will invoice buyer's associates and approved distributors for Cordovan brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise purchased under this contract.

The corresponding provision in the White contract was in all material respects identical[1] and it was found (Apdx. 4a) that in fact the prices charged the two customers on sales subsequent to the written contracts continued to be identical for the same kind, quality and size of tires and tubes (Apdx. 5a).

The trial judge also found that for the fiscal year ending October 31, 1957, there was established and

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[1] The corresponding provision in the White contract read as follows:

> "5. Prices. Supplier will invoice Buyer and approved distributors for White brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales or manufacturer's tax levied by lawful authority on the merchandise purchased under this agreement."

in effect, as a part of the pricing policy of the chain store division, a yearly volume rebate program. This program was identical in its provisions for both Cordovan Associates and White Stores, Inc. (Apdx. 5a). In practice, the volume rebate program accorded somewhat more favorable prices to the Cordovan distributors than to White Stores and, on February 1, 1958, Dayton proposed that for the fiscal year ending October 31, 1958, it would set up a volume rebate program based on the result of the combined purchases of White Stores and Cordovan distributors for such fiscal year. This was designated as a super-bonus program and was accepted by both Cordovan and White on February 2, 1958 (Apdx. 6a). The trial judge held that by initiation of a super-bonus program, Dayton made a concession to Cordovan and White in the prices charged, which concession was within the terms of the contract providing for "prices prevailing on date of shipment" (Apdx. 6a).

In his comments, the trial judge observed that Cordovan and White had been customers of the chain store division of Dayton for a long period of time and that, throughout the dealings, there was always an effort on the part of each to obtain more favorable prices. (Apdx. 10a).

On June 12, 1958, Dayton, responding to market pressures (Apdx. 7a), presented a new plan of pricing to White which was called "based on cost" prices, as distinguished from the old plan of so-called "cost justification" (Apdx. 7a). The new plan of pricing was made retroactive to June 1, 1958. The trial judge found this new plan was an entirely different method of pricing and was not included in paragraph 5 of the contracts calling for "prices prevailing on date of shipment". The new plan afforded White prices

approximately 10% lower than the prices accorded under the old formula.

The trial judge further found that throughout the months of April, May and June of 1958, negotiations also took place between Cordovan and Dayton with respect to a new or amended contract to take the place of the contract, the construction of which was in issue (Apdx. 6a-7a). He found that the purpose of these negotiations on the part of Cordovan was to obtain more favorable prices, a "cost plus" basis of pricing and a different method of operation (Apdx. 7a). These negotiations proved abortive and no new contract eventuated, though on June 26, 1958, Dayton offered Cordovan Associates a new contract with the same pricing plan which had been given to White Stores. Certain conditions in the new contract were refused by Cordovan, and, accordingly, until the expiration of its contract on October 31, 1958, charges were made to Cordovan under the "prevailing price clause" and these charges the trial judge concluded were proper.

On review, the Court of Appeals observed that basicly Cordovan contended "that all parties understood the prices were to be the same to each of the two large chain store customers." The court held that the decisive question was whether or not this contention was correct. It then observed that the trial judge had stated in his findings that "[t]here was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances." The Court of Appeals said this was actually an inference or conclusion from the facts with which it was free to disagree, uninhibited by the clearly erroneous test of Rule 52 of the Federal Rules of Civil Procedure. The Court did disagree and disagreeing reversed the judgment of the District Court.

In noting its disagreement the Court of Appeals referred to the "manifest meaning of the language used," to the "uniform pricing policy" of Dayton and to the practical interpretation placed on the contract by the parties (Apdx. 15a-16a). In these areas it disagreed with the District Court and thus found, contrary to the District Court, that all parties understood that the prices were to be the same to each of the two large chain store customers under all circumstances (Apdx. 15a, 17a). Consequently, it decided that the more favorable prices negotiated by White inured to the benefit of Cordovan distributors. The court did not comment upon the fact that the trial court had found, in effect, that "prices prevailing on date of shipment" had reference to a pricing formula, the so-called (cost justification formula); it did not comment upon the fact that the White contract was entered into before the Cordovan contract and was for a term of three years rather than the two year term of the Cordovan contract. Nor, did the court refer or comment upon the fact found by the trial court that Cordovan, like White, had tried to obtain a different cost basis though Cordovan sought "cost plus" prices at the time that White agreed to accept prices "based on cost." These factors were not alluded to by the Court of Appeals even though it disagreed with the District Court and reversed its judgment.

REASONS FOR GRANTING THE WRIT

(1) This case emphasizes the conflict that exists between the circuits as to the application of the clearly erroneous test of Rule 52. On the one hand, there is a line of authority holding that inferences and conclusions drawn by the trial judge are not to be rejected by a reviewing court unless clearly erroneous. These

cases frequently cite and rely upon the decision of this Court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394. On the other hand, there is a line of authority that holds that findings which embody inferences and conclusions can be set aside when the reviewing court disagrees with the position of the trial court. These authorities either ignore or seek to distinguish the holding of this court in *United States* v. *U. S. Gypsum Co., supra.*

In *Texas Co. v. R. O'Brien & Co.*, 242 F. 2d 526, the Court of Appeals for the First Circuit observed that there is a singular lack of unanimity not only between but within individual circuits with regard to the right of a reviewing court to disregard what it termed ultimate findings, when based upon written or undisputed evidence and the court collected some of the more recent examples[2] of such disagreement.

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[2] The court notes the following recent examples of conflict:

Court free to disregard ultimate findings when based upon written or undisputed evidence: *Kraft Foods Co.* v. *Commissioner of Internal Revenue*, 2 Cir., 1956, 232 F. 2d 118; *United States* v. *One 1950 Buick Sedan*, 3 Cir., 1956, 231 F. 2d 219 (court reaches result by indicating an ultimate "inference" is not a "finding of fact."); *Seagrave Corp.* v. *Mount*, 6 Cir., 1954, 212 F. 2d 389; *Chicago, Burlington & Quincy R. Co.* v. *United States*, 7 Cir., 1955, 221 F. 2d 811; *Stevenot* v. *Norberg*, 9 Cir., 1954, 210 F. 2d 615.

Court cannot reverse such findings merely because it disagrees with them, but must conclude they are "clearly erroneous"; *Central Ry. Signal Co.* v. *Longden*, 7 Cir., 1952, 194 F. 2d 310; *Coleman* v. *Sears, Roebuck & Co.*, 8 Cir., 1956, 238 F. 2d 206; *Hycon Manufacturing Co.* v. *H. Koch & Sons*, 9 Cir., 1955, 219 F. 2d 353, certiorari denied, 1955, 349 U.S. 953, 75 S. Ct. 881, 99 L. Ed. 1278; *Kaye* v. *Smitherman*, 10 Cir., 1955, 225 F. 2d 583, certiorari denied, 1955, 350 U.S. 912, 76 S. Ct. 197, 100 L. Ed. 800; *Bishop* v. *United States*, 1955, 96 U.S. App. D.C. 117, 223 F. 2d 582, judgment vacated and remanded, 1956, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 semble.

The seriousness of the disagreement that exists between the circuits is reflected in the two different lines of authority that have developed within the Sixth Circuit. In the instant case the court singled out a particular finding which it held embodied an inference or conclusion, and so holding felt free to disagree uninhibited by the clearly erroneous test of Rule 52. It could support its position by citing authorities both from within the Sixth Circuit and from other circuits. Nevertheless, the position taken is in sharp contrast to the holding of a different panel of the same court in *Wright* v. *C.I.R.*, 274 F. 2d 883, 884 (decided February 20, 1960), where the court did apply the clearly erroneous test to the inferences and conclusions of the trial judge. In that case the court said—

> We consider the inferences and conclusions of the trial judge to be logical and reasonable and not clearly erroneous. Rule 52(a) F.R.Civ.P., 28 U.S.C.A. being applicable, the decision of the Tax Court will not be disturbed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; *McAllister* v. *United States*, 348 U.S. 19, 20, 76 S. Ct. 6, 99 L. Ed. 20; *Central Ry. Signal Co.* v. *Longden*, 7 Cir., 194 F. 2d 310, 318; *Wise* v. *C.I.R.*, 6 Cir., 260 F. 2d 354.

It will be observed that the court in that case was relying upon the decision of this court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364; and *McAllister* v. *United States*, 348 U.S. 19, 20. It also relied upon a decision in another circuit as well as a prior decision of the Sixth Circuit. The fact is that in several recent opinions, *Willett* v. *C.I.R.*, 277 F. 2d 586 (C. A. 6, 1960); *C.I.R.* v. *Consolidated Iron Ores Limited*, 265 F. 2d 320 (C. A. 6, 1959); and, in *Yunker*

v. *Commissioner*, 256 F. 2d 130 (C. A. 6, 1958), the Court of Appeals for the Sixth Circuit has expressly referred to this conflict,[3] noting that it exists not only within the Circuit, but that there is a conflict between the circuits. In the recent *Willett* case, *supra*, the court said

> Counsel for the petitioners contend that the clearly erroneous rule is not applicable to conclusions drawn by the Trial Judge from undisputed facts.
>
> In *Commissioner of Internal Revenue* v. *Consolidated Premium Iron Ores, Limited, supra*, it was pointed out by this Court that not only is there a conflict in the Circuits on this point but there are also conflicts on it within the Circuits. This is true in the Sixth Circuit. (See cases cited in the *Consolidated Premium Iron Ores* case.) On this question we adhere to the view expressed in the *Consolidated Premium Iron Ores* case.

While this Court has in such cases as *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275-276; *McAllister* v. *United States*, 348 U.S. 19, 20; and, *Commissioner* v. *Duberstein*, — U.S. —

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[3] The position taken by the court in this case as to the application of the clearly erroneous test is wholly inconsistent with the position taken in other recent cases in the same court. See *United States* v. *Allinger*, 275 F. 2d 421 (decided March 3, 1960); and, *Willett* v. *C.I.R.*, 277 F. 2d 586 (decided April 12, 1960); and is inconsistent with the holding in *C.I.R.* v. *Consolidated Premium Iron Ores Limited*, 265 F. 2d 856 (C. A. 6, 1959); *Dixie Sand & Gravel Corp.* v. *Holland*, 255 F. 2d 304 (C. A. 6, 1958); and *Rich* v. *Pappas*, 229 F. 2d 308 (C. A. 6, 1956). But views contrary to those expressed in the above cases are found in: *Gudgel* v. *C.I.R.*, 273 F. 2d 206 (C. A. 6, 1959); *Yunker* v. *Commissioner*, 256 F. 2d 130 (C. A. 6, 1958); *E. H. Sheldon and Co.* v. *C.I.R.*, 214 F. 2d 655 (C. A. 6, 1954); *Seagrave Corp.* v. *Mount*, 212 F. 2d 389 (C. A. 6, 1954); and, *Letcher County* v. *Defoe*, 151 F. 2d 987 (C. A. 6, 1945).

(decided June 13, 1960), considered and laid down guide posts as to the right of a reviewing court to reject the findings of a trial court, it nevertheless appears that the decisions of the several circuit courts are far from harmonious. It is clear from the conflicting decisions that the various circuit courts have divergent views as to the substance of this Court's prior decisions. The split in the authorities is manifest and is reflected in the conflicting decisions of individual circuits which produces a particularly undesirable situation because success or failure on review depends too often upon the fortuitous circumstance of the make-up of the panel that hears the case. The question is one which arises in many cases and, as a consequence, is obviously important. The guide posts which this Court has laid down, in this admittedly difficult area, are not sufficient as yet to bring harmony into the decisions and we believe, therefore, the Court might well consider the question raised as worthy of further consideration and elucidation.

(2) While the court below could, because of the conflicting decisions in the several circuits and within the circuit, find some authority for its position in this case, we submit that it is clear the court actually failed to follow the authoritative decisions of this Court when it simply noted its disagreement with the finding in question and did not subject it to the clearly erroneous test. The court below felt it was uninhibited by the clearly erroneous test because the finding in question was an "inference or conclusion", but it is clear from the authoritative decisions of this Court that to the extent this finding did involve inferences from basic facts it should have been subjected to the clearly erroneous test. See, *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Commissioner* v. *Duberstein*, — U.S. — (decided June 13, 1960).

The court observed that what was essentially at issue was the understanding of the parties as to the meaning of the phrase "prices prevailing on date of shipment." That understanding was a question of fact which the trial court had the duty to resolve. This was not a case in which the facts, as such, were undisputed. There were two weeks of trial and numerous witnesses testified. In many areas the evidence was conflicting. This was particularly true with regard to the pricing policy of Dayton and the significance of the various facts which constituted the practical construction of the contract by the parties. The trial court distilled these disputed facts into findings, and in the course of those findings stated—

> "There was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances.

The Court of Appeals disagreed with that finding, but did not say that it was left with a definite or firm conviction that the finding was erroneous; it did not say the finding was induced by an erroneous view of the law; or, that it was against the weight of the evidence. The appellate court simply disagreed. Its disagreement tends to gloss over the fact that what the court actually did on review was to fish in the troubled waters of conflicting inferences.

The Court of Appeals treated the case as one in which there was no dispute as to the evidentiary facts. It could do this, however, only in the sense that Cordovan, as appellant, accepted most of the findings of the trial judge. Those findings were in important respects the end product of sharply conflicting evidence. When the trial court declared that there were no facts from which it could draw an inference

that Cordovan prices were to be tied to White prices under all circumstances, it undoubtedly had in mind the conflicting evidence presented with respect to the pricing policy of Dayton and the meeting in February of 1958, at which the super bonus program was inaugurated. The trial court may also have had in mind that any conclusion that White and Cordovan prices were to be the same under all circumstances would run counter to the fact that the White contract and the Cordovan contract were entered into at different times and extended for different periods of time (Apdx. 4a). It might also have had in mind that any conclusion that White and Cordovan prices were to be the same under all circumstances would be at odds with the fact that both White and Cordovan separately and repeatedly negotiated for different base prices (Apdx. 10a).

The Court of Appeals, in reversing the judgment of the trial judge, purports to disagree only with a single finding. In reality, the disagreement was more profound because the court found in effect, contrary to the trial court, that it was the policy of Dayton to accord identical prices to both White and Cordovan "under all circumstances" and found the course of dealing of the parties demonstrated an understanding that White and Cordovan be accorded identical prices "under all circumstances." The Court of Appeals quite obviously looked at the policy of Dayton and the course of dealings of the parties differently than did the trial court, though the trial court heard and observed the witnesses who testified with respect to the policy and the course of dealings. While the court speaks of the finding in question as an inference, there must first be facts before there can be an inference and the determination as to whether or not

there were facts is itself a factual determination to which the clearly erroneous test should have been applied.

The decision of the Court of Appeals in this case was issued on June 6, 1960. Seven days later this Court rendered its opinion in *Commissioner* v. *Duberstein*, — U.S. —, (decided June 13, 1960), and reiterated its position as to the application of the clearly erroneous test and particularly its application to inferences. It said, in part—

> Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed Rules Civ Proc, 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766, 68 S. Ct. 525. The rule itself applies also to factual inferences from undisputed basic facts, id 333 U.S. at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 609, 610, 94 L. Ed. 1097, 1102, 1103, 70 S. Ct. 854. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. IRC, § 7482(a).

In the present case it seems clear that the court below erred when it failed to apply the clearly erroneous test to the finding in question. We think that, regardless of the semantics involved, it is obvious that what the court below did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Under

the authoritative decisions of this Court this was clearly improper.

CONCLUSION

We believe that the error in the decision of the court below is manifest and that to the extent the court set aside inferences by the trial judge simply because it disagreed with them the decision is in conflict with principles established in the applicable decisions of this Court. It is suggested that the Court for that reason might deem it appropriate to grant the writ and reverse without further briefs or argument. We would also point out, however, that this case does signalize and emphasize the divergent views that have been, and now are, held with respect to the application of the clearly erroneous test. The views are so divergent that they are reflected in contradictory decisions within individual circuits, and since the principles involved are important in many cases it may well be that the Court would deem it appropriate to restate and make more explicit the considerations that are to guide reviewing courts with regard to the application of the clearly erroneous test of Rule 52.

Respectfully submitted,

PHILIP C. EBELING
PICKREL, SCHAEFFER AND EBELING
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner

APPENDIX

APPENDIX A

Findings of Fact and Conclusions of Law

(Filed May 6, 1959.)

CECIL, District Judge:

This case was tried and submitted to the Court upon the pleadings, the evidence and oral arguments of counsel. Upon consideration whereof, the Court makes the following Findings of Fact:

1. Plaintiff, The Dayton Rubber Company, hereinafter for convenience referred to as "Dayton Rubber," is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen of the State of Ohio.

2. Defendant, Cordovan Associates, Incorporated, hereinafter for convenience referred to as "Cordovan," is a corporation organized and existing under and by virtue of the laws of the State of Virginia, and is a citizen of the State of Virginia.

3. Cordovan is the owner, by conveyance and assignment from Automotive Associates, Inc., a corporation on or about March 1956, of the trade-mark "Cordovan" and the molds in which the "Cordovan" brand casings and tubes are manufactured.

4. Cordovan is engaged in the business of having manufactured for its associate members and approved distributors "Cordovan" brand casings and tubes for resale by such associates and approved distributors, who are Chain Store Operators of automotive retail businesses throughout a large area of the United States. Such associate members and approved distributors are hereafter, for convenience sake, referred to as "Cordovan Associates."

5. "Cordovan" brand casings and tubes have, since about 1947 and continuously since that date and throughout the term of the contract the subject of this action, been manufactured by Dayton Rubber for purchase and resale by automotive Chain Store businesses authorized to use the "Cordovan" brand by the owner of such mark and molds.

6. White Stores, Inc., hereafter, for convenience sake, referred to as "White," is a corporation with its principal office in Wichita Falls, Texas, and is now, and at all times since about 1947 has been, the owner of the trademark and name "White" as applied to casings and tubes, and the owner of the molds in which such casings and tubes were manufacturing for it by Dayton Rubber. White Stores, Inc., operates a Chain Store retail business in the automotive field in Texas and nearby States.

7. Prior to November 1, 1956, for several years, Dayton Rubber manufactured its own private brand casings under the trademark and name "Road King" for purchase for resale by chain store automotive businesses.

8. Since about 1947, Dayton Rubber has operated a division of its business under a division of its company generally known and described as its "Chain Store Division."

9. At all times since the organization of such Division, Dayton Rubber has conducted its operations in the manufacture and sale of "Cordovan," and "White," and "Road King" casings and tubes by and through its Chain Store Division, and purchasers of casings and tubes manufactured and sold by Dayton Rubber through its Chain Store Division consisted only of Cordovan Associates, White, and purchasers of the "Road King" brand.

10. Billing prices of casings and tubes manufactured and sold by Dayton Rubber through its Chain Store Division were established on what is known in the trade as a "Cost Justification" basis.

11. At all times prior to August 16, 1956, and continuously thereafter until June 1, 1958, the net billing prices of the Dayton Rubber for tires (casings) and tubes of the same quality, kind, and size sold by it through its Chain Store Division were identical as between all customers of the Chain Store Division of Dayton Rubber, including White and Cordovan Associates. The "net billing price," as herein used, sometimes referred to in the trade as "base billing price," means the gross billing price less "mold amortization" charge in the case of Cordovan, and "price equalization" charge for amortization of White molds in the case of White.

12. For several years prior to August 16, 1956, there was a pricing policy established and in effect in the Chain Store Division of Dayton Rubber, applicable alike to all customers of such Division, whereby identical base or net billing prices were established for all tires and tubes sold through such Division to all customers thereof, namely, Cordovan, White and Road King, and that Cordovan Associates and in particular representatives thereof constituting the Board of Directors of Cordovan, had been told of this uniform pricing policy, and that base or net billing prices for tires and tubes of the same kind, quality and size were identical as between all customers of such Division.

13. Prices as established by Dayton Rubber in its Chain Store Division fluctuated from time to time with industry conditions, but fluctuations so occurring were applied uniformly and identically as to all customers of such Chain Store Division. Prices, as established in the Chain Store Division, were revised from time to time, generally on a quarterly basis, and shipments made during any such quarterly period were at the prices as established and then in effect for such quarterly period. This policy was known to Cordovan Associates, White, and customers of the Road King brand, being all of the customers of the Chain Store

Division throughout the time of their respective purchasing from such Chain Store Division.

14. Prior to August 1, 1956, there were no written contracts between Dayton Rubber, Cordovan, Cordovan Associates, or White.

15. In the Summer of 1956, prior to August 1, 1956, Dayton Rubber concluded to abandon its efforts to promote sales of its own Road King brand through its Chain Store Division, and to promote its sales to chain stores through expansion of Cordovan Associates and White retail sales outlets. In adopting this policy, Dayton Rubber desired to assure itself for a proposed period of at least three years of the purchase from Dayton Rubber of all of the tire and tube requirements of all Cordovan Associates and White, and proposed to such a written contract accordingly.

16. Such written contracts, as prepared by Dayton Rubber and so proposed to Cordovan and White, were duly executed and delivered between Dayton Rubber and White (Exhibit No. D) for a term of three years commencing August 1, 1956, and between Dayton Rubber and Cordovan (Exhibit No. 1) for a term of two years commencing November 1, 1956, Cordovan at that time being unwilling to enter into such proposed contract for a term of more than two years.

17. The contract with White contained the following paragraph as to prices to be charged for tires and tubes purchased from Dayton Rubber under such contract:

> "5. Prices. Supplier will invoice Buyer and approved distributors for White brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise purchased under this agreement."

The contract with Cordovan contained the following paragraph with regard to prices for tires and tubes purchased under such contract.

> "5. Prices. Supplier with invoice buyers associates and approved distributors for Cordovan brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise under this agreement."

In each contract, the prices at which the tires and tubes to be purchased thereunder were defined as "prices prevailing on date of shipment."

18. At all times from and after the effective date of such contract, November 1, 1956, and until at least June 1, 1958, net billing prices as stipulated in evidence between the parties hereto were identical as between Cordovan Associates and White for the same kind, quality and size of tires and tubes.

19. That for the fiscal year ended October 31, 1957, there was established and in effect, as a part of the pricing policy of the Chain Store Division, a volume rebate program on a graduate scale of percentage rebate on volume of purchases for such fiscal year identical in its provisions with both Cordovan Associates and White, but that the net result of this volume rebate policy was to create a difference in volume purchase percentage rebate to Cordovan as compared to White, because of the different aggregate volume of annual purchases of these two groups for such fiscal year. The purpose of such bonus program was to create an incentive for Cordovan Associates and White to increase their resales of Dayton Rubber products, and the plan in effect as to both was identical.

20. For the purpose of creating a greater sales incentive for the future to Cordovan Associates and White, and

establishing a joint bonus and super-bonus program, based on combining the sales of both for computation of such volume rebates, Dayton Rubber invited the members of the Board of Directors and officers of Cordovan and the President of White to a joint meeting at the Ambassador East Hotel, in Chicago, on the evening of February 1, 1958, and at this meeting Dayton Rubber, through its representatives, proposed that for the fiscal year ended October 31, 1958, Dayton Rubber would set up a volume rebate program based on the result of the combined purchases of White and Cordovan Associates for such fiscal year on a graduate scale of percentage rebate on such combined purchases up to a maximum of 7½%, which Dayton Rubber designated as a "super-bonus program," and that, anticipating such combined sales volume would reasonably exceed a minimum of 5% of such fiscal year, credit memos would be issued to each purchaser with respect to all purchases of tires and tubes made after November 1, 1957, to February 28, 1958, and thereafter for the remainder of such fiscal year such 5% credit would be applicable to all further purchases during the remainder of the fiscal year, and final credit memo issued at the end of such fiscal year.

21. The above proposal by Dayton Rubber was accepted by both Cordovan and White February 2, 1958, credit memos pursuant thereto were duly issued, and base or net billing prices continued and remained identical as between Cordovan Associates and White until June 1, 1958.

22. At the Chicago meeting the Dayton Rubber made a concession to Cordovan and White in the prices charged which concession was within the terms of "prices prevailing on date of shipment." There were no modifications of, or amendments or supplements to the contracts between Dayton Rubber and Cordovan and Dayton Rubber and White.

23. After April 1, 1958, and throughout the months of April, May and June of that year, negotiations took place

between Cordovan and Dayton Rubber with respect to a new or amended contract to take the place of the contract, the construction of which is the issue before this Court, but such negotiations failed to result in any new or amended contract, and the contract submitted to this Court for construction remained in full force and effect until October 31, 1958, without change. The purpose of the negotiations was to get more favorable prices—a cost-plus basis of pricing and a different method of operation.

24. Near the end of April, 1958, Cordovan notified Dayton Rubber that it would terminate the contract as of October 31, 1958. Toward the end of the year 1957, White advised Dayton Rubber that U. S. Rubber Co., had quoted it better prices than Dayton Rubber was giving.

25. Dayton Rubber was concerned about the possible loss of the Cordovan business and was interested in obtaining a new contract with it. Dayton Rubber was also concerned with retaining the business of White and was under threat of White to buy of other manufacturers at lower prices.

26. On June 12, 1958, Mr. Goodenberger made a trip to Texas to see representatives of White. At this time as a result of White's complaints about the prices of "White" brand casings and tubes being too high, and White's threat to buy casings and tubes elsewhere at lower prices, Dayton Rubber presented to White a new plan of pricing. This new plan was called a "based on cost price" as distinguished from the old plan which was called "cost justification." Under the new plan the bonus and super bonus rebates were abandoned. The new plan of pricing was accepted by White and became effective retroactively to June 1, 1958. This new plan was an entirely different method of pricing and was not included under paragraph 5 of the contracts, "Prices prevailing on date of shipment." This method of pricing was abandoned. This new plan provided for about a 10% lower cost to White.

27. On June 26, 1958, Dayton Rubber offered a new contract to Cordovan to replace the old contract expiring on October 31, 1958, and to be effective as of July 1, 1958. This offer provided for the same method of pricing as was given to White and the prices were identical with those of the new White Plan. There were conditions attached to the offer which were unacceptable to Cordovan and no new agreement was made.

28. There was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances.

29. From and after June 1, 1958, Dayton Rubber continued to invoice Cordovan Associates at prices "prevailing on date of shipment" which were higher than prices made effective June 1, 1958 as to White purchases from its Chain Store Division.

CONCLUSIONS OF LAW AND FACT

1. The Court has jurisdiction over The Dayton Rubber Company, plaintiff, herein, and defendant, Cordovan Associates, Incorporated the parties herein and the subject matter of this action.

2. The sole issue before this Court is the construction of the contract and in particular Paragraph 5 thereof, entered into between plaintiff and defendant herein under date of November 1, 1956, a copy of which contract is in evidence, marked "Exhibit 1."

3. Such contract was duly executed and delivered between the parties hereto and is a valid and enforcible contract for the specified term thereof, to-wit: November 1, 1956 to October 31, 1958.

4. Paragraph 5 of the contract between Dayton Rubber and Cordovan does not in and of itself specify any particu-

lar schedule of prices that can be determined without reference to sources outside of the document.

The phrase "at prices prevailing on date of shipment" as used in the contract, contemplates a schedule of prices to be fixed by the seller. These prices cannot be arbitrarily fixed, but must be such as will enable the manufacturer, (seller) to compete with other manufacturers for the business of the buyer (Cordovan) and such as will enable the buyer to compete with other dealers for the business of the buying public, that is, the customer.

Since the contract between Dayton Rubber and White had the same paragraph 5 as the Cordovan contract and used the term "prevailing prices" in the same way, it must be construed that White prices and Cordovan prices would be the same.

5. The Court concludes, that the prices would be the same for the reason that the provisions of the contracts are the same, both units were customers of the Chain Store Division and the only brand customers of that Division and the volume of business of the two units were substantially the same. Things that are equal to the same things are equal to each other.

6. Finally, the Court draws inferences and conclusions from the facts found that the pricing schedule at which White was billed after June 1, 1958, constituted a new method of pricing and was not included within the term "at prices prevailing on date of shipment";

That this new plan of pricing was adopted in order to hold the business of White and to obtain a new contract with Cordovan.

That Cordovan did not accept the new plan with the conditions attached;

And that it was, therefore, bound by its contract to pay "at prices prevailing on date of shipment" until its contract expired on October 31, 1958.

Wherever in these Findings and Conclusions a statement is a mixed Finding of Fact and Conclusion of Fact, it may be considered as either or both.

COMMENT

Cordovan and White had been customers of the Chain Store Division of Dayton Rubber for a long period of time. Their dealings antedated by several years, the contracts which are involved in this case. Throughout these dealings, there was always an effort on the part of the customers to obtain more favorable prices. In the Fall of 1957, this apparently had reached a point where Dayton Rubber considered that it was necessary to make some concessions.

At a meeting in Chicago on February 1, 1958, Mr. Eisbrouch, at that time of Dayton Rubber, offered to representatives of Cordovan and Mr. White a plan whereby a rebate, called a "super bonus" was to be figured on the combined purchases of both White and Cordovan. This was a considerable concession and eased the tension for a while.

On April 1, 1958, Mr. Eisbrouch, who had left Dayton Rubber, became the executive head of Cordovan. He immediately began negotiating with Dayton Rubber for a different price formula. It was the feeling of representatives of Cordovan that it had reached maturity, so to speak, and was buying in sufficient quantities that it should be entitled to a price formula known as "cost-plus." To strengthen its demands and bargaining position, Cordovan, toward the end of April, 1958, gave Dayton Rubber the six months' notice required by the contract that it would terminate its contract on October 31, 1958. Mr. Eisbrouch was negotiating for a new pricing agreement on a cost-plus basis for Cordovan. He was not concerned about lower prices for White.

In the meantime, White was restless. As Mr. White indicated in his deposition, he was of the opinion that he

was not bound by the contract if he could obtain better prices elsewhere. In the face of losing this substantial block of business, Dayton Rubber was forced to try to adopt some plan that would salvage the business of these two customers.

Accordingly, it worked out a new pricing plan known as "based on cost" prices. By this plan rebates were abandoned and net prices were about 10% lower than they had been under the old plan. Mr. Goodenberg offered this new pricing plan to White and it was accepted. White continued its business with Dayton Rubber. Thereafter, Dayton Rubber offered the plan to Cordovan, with some conditions attached. The purpose of Dayton Rubber offering this plan to Cordovan was to get a new contract. Dayton Rubber considered that it could not offer the plan without the conditions and Cordovan considered that it could not accept the plan with the conditions. Therefore, no agreement was reached and Dayton Rubber lost the business with the expiration of the contract.

It seems absurd that Dayton Rubber would be bound to reduce Cordovan's prices by 10% and still not get any contract. Certainly, it cannot claim the benefit of prices which were given to White in order to retain its business and with which Dayton Rubber did hold the White business.

(Signed) Lester L. Cecil
Judge, United States
District Court, S.D.O.

APPENDIX B

Order of Declaratory Judgment

(Filed June 8, 1959.)

This case came on for hearing upon Plaintiff's Complaint for a Declaratory Judgment, the Defendant's Amended Answer, the oral evidence, stipulations of counsel, exhibits, proposed findings of fact and conclusions of law, oral arguments and briefs of counsel.

Upon consideration whereof the Court finds the facts to be as stated in findings of facts filed on May 6, 1959, which are incorporated herein and made a part hereof.

That the Court has jurisdiction over the Dayton Rubber Company, the plaintiff herein and Cordovan Associates, Incorporated, the defendant herein, and the subject matter of this action, between Dayton Rubber Company and Cordovan Associates, Incorporated.

That a certain contract entered into between plaintiff and defendant herein under date of November 1, 1956, a copy of which contract is in evidence marked "Exhibit 1" was duly executed and delivered between the parties hereto and is a valid and enforcible contract for the specified term thereof, to-wit, November 1, 1956 to October 31, 1958.

That the correct prices are determined under Paragraph 5 of the contract to be those prices established at the time of shipment by the plaintiff for merchandise sold by the plaintiff to the defendant's associates and approved distributors during the term of the contract.

And that all of the conclusions of law and fact as stated in the Court's conclusions dated May 6, 1959 are incorporated herein and made a part hereof.

Costs of $21.40 paid.

/s/ Lester L. Cecil
Judge, U. S. District Court,
SDO.

APPENDIX C

Opinion of the United States Court of Appeals For the Sixth Circuit

Before MARTIN, WEICK, and O'SULLIVAN, Circuit Judges.

Martin Circuit Judge. The Dayton Rubber Company, a manufacturer of automobile tires and tubes, brought this action for a declaratory judgment, interpreting the pricing clause of a contract between that company and Cordovan Associates, Incorporated, one of the two automobile retail chain sfores to which its manufactured tires and tubes were sold. The contract prices to be paid for tires, purchased by Cordovan Associates from Dayton Rubber Company, were to be "prices prevailing on date of shipment." A separate contract with White Stores, Inc., the other automotive retail chain store to which Dayton Rubber Company sold its tires, contained an identical pricing clause.

The defendant-appellant, Cordovan Associates, Incorporated, appeals to this court from an adverse Declaratory Judgment entered by the trial judge, who found the prices charged by the rubber company to be lawful under its contract with appellant. This judgment was in consonance with the Findings of Fact, the "Conclusions of Law and Fact" and the "Comment" made by the trial judge after a non-jury trial of two weeks' duration.

From 1947 to 1956, Dayton Rubber Company, through its chain-store division, had sold tires to both White Stores and Cordovan Associates, billing them on an identical "cost justification" basis without written contract with either customer. Fluctuations in prices, which generally came about quarterly, were applied uniformly and identically to shipments going to both customers. In 1956, the appellee company executed separate contracts with White Stores and Cordovan Associates for stated terms of three and two years, respectively. The two contracts contained the same pricing clause: "prices prevailing on date of shipment." The prices charged the two customers on

sales subsequent to the contracts continued to be identical for the same kind, quality and size of tires and tubes.

This equal-treatment policy continued after separte, but identical, supplemental agreements between Dayton Rubber Company and Cordovan Associates, Incorporated, and between Dayton Rubber Company and White Stores, Inc., had been entered into on February 2, 1958. In these supplemental agreements, the rubber company gave each of its two chain store customers a scale of rebates, graduated according to the combined volume of tires purchased, up to a maximum of seven-and-one-half percent of the purchase price. This concession to the two customers was made in order to instill greater buying initiative; and prices to each chain-store customer continued to be computed identically thereunder until June of 1958. The concession, or modification, was within the terms of the "prices prevailing on date of shipment" provision included in each of the contracts.

Although the contract between Dayton Rubber Company and White Stores, Inc., had more than a year to run, the appellee rubber company on June 12, 1958, gave White Stores a new pricing plan, "based on cost price." This was done in order to retain the customer's business; and the plan was made retroactively effective to June 1, 1958. This cost-price plan proved to be ten percent lower to White Stores than was the old "cost justification" formula; and it was found to be "an entirely different method of pricing and was not included under paragraph 5 of the contracts."

On June 26, 1958, the appellant, Cordovan Associates, Incorporated, was offered a new contract with the same new pricing plan which had been given to White Stores. Certain conditions therein were refused by the appellant. So, until the expiration of its contract on October 31, 1958, charges were made to the Cordovan company under the "prevailing price" clause. These charges were ten percent higher than those which White Stores was required to

pay during the same period. It is the contention of appellant that the "prevailing prices" clause in its contract with Dayton Rubber Company entitled it to the same prices given by appellee to White Stores under an identical pricing clause in the contract between the rubber company and White Stores; and that all parties understood the prices were to be the same to each of the two large chain-store customers.

Whether or not this contention is correct is the decisive question to be answered on this review. *Chandler* v. *United States*, 226 F. (2d) 403, 405 (C. A. 7). Although the able trial judge stated in his findings of fact that "there was no provision, either oral or written, nor were there facts from which an inference could be drawn, that Cordovan prices were to be tied to White prices under all circumstances," this is actually an inference or conclusion drawn from the facts with which an appellate court, uninhibited by the "clearly erroneous" test of Rule 52, Federal Rules of Civil Procedure [28 U. S. C. A., following 723 (c)], is free to disagree.

In the case at bar, as in *Letcher County* v. *DeFoe*, 151 F. (2nd) 987, 990, (C. A. 6), there was "no factual controversy and no challenge to the evidentiary findings of the court." In such a situation, an appellate court, "remains free to draw the ultimate inferences and conclusions which evidentiary writings reasonably induce." See also *Wallnig* v. *N. C. & St. L. Ry.*, 155 F. (2d) 1016 (C. A. 6); *Harris Stanley Coal & Land Co.* v. *C. & O. Ry. Co.*, 154 F. (2d) 450 (C. A. 6).

Considering the language used in the pricing clause of the contract—"prices prevailing on date of shipment" —we think it necessary, if possible, to enforce the instrument according to the manifest meaning of the language used. The term "prevailing prices" would seem to mean prices, which, at any particular time, are charged by a seller for a certain product. We think it would be illogical to hold that a seller may charge one of its two cus-

tomers a lower price than the other for the same item, when both have contracts to receive goods at "prevailing prices." There can be only one "prevailing price" at a given time; and, in the present context, it would fairly mean the lowest price for the commodity which the seller gives to either of his two large buyers in conformity with a contract provision for sales at "prevailing prices."

Throughout their course of dealing, it had been the uniform pricing policy of Dayton Rubber Company to bill its two chain store customers at identical base, or net, billing prices for tires furnished. The prices fluctuated from time to time, but the fluctuations were applied "uniformly and identically as to all customers." The Board of Directors of Cordovan Associates was told of this pricing policy; and this was the system which the parties followed without deviation. Thus, in departing from this system by giving White Stores a lower price, for whatever reason, and correspondingly refusing to lower the price to Cordovan Associates, except under certain conditions, the appellee company was no longer selling to appellant at the "prevailing price" called for in the contract between them.

Even if the meaning of "prevailing prices" is not disclosed by the actions of the parties up to the time the contract between Dayton Rubber Company and Cordovan Assoicates was signed, their own practical interpretation of the pricing clause in performing the contract would carry great weight—if indeed it did not control—in its interpretation. This has been the settled rule both in this circuit and in the State of Ohio. *Federal Surety Co.* v. *Bentley & Sons Co.*, 51 F. (2d) 24 (C. A. 6). See also *Cincinnati* v. *Gas Light & Coke Co.*, 53 Ohio St. 278, where the Ohio Supreme Court held that a contract to furnish gas at the "lowest average price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburgh," was sufficiently clear and unambiguous to be interpreted by the court. The court added that, in case of doubt, the prac-

tical interpretation which had been placed on the contract by the parties over a long period of time should be adopted as the proper one. It was stated, however, that "to have any value as a practical construction, the course of dealing should be uniform, unquestioned and fully concurred in by both parties." Such was certainly the situation with respect to Dayton Rubber Company and Cordovan Associates, Incorporated.

For the foregoing reasons, the Declaratory Judgment entered in the United States District Court is reversed. The case is remanded for entry of judgment in accordance with this opinion.

APPENDIX D

Judgment

June 6, 1960

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the Declaratory Judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of judgment in accordance with the opinion herein.

FILE COPY

No. 324

In the

Supreme Court of the United States

October Term, 1960

DAYTON RUBBER COMPANY,
Petitioner

v.

CORDOVAN ASSOCIATES INCORPORATED
Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD W. GALIHER
1215 19th Street, N. W.
Washington, D. C.
MORTON HONEYMAN
324 Washington Avenue, S. W.
Roanoke, Virginia
ROBERT F. YOUNG
HARSHMAN, YOUNG, COLVIN & ALEXANDER
1201 Third National Building
Dayton, Ohio
Attorneys for Respondent

Court Index Press, Inc. — Law Printers — 809 Walnut St., Cincinnati 2, Ohio

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CORDOVAN ASSOCIATES, INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOTE ON ABBREVIATIONS

For purposes of convenience, we shall follow the abbreviations adopted by petitioner. Thus, Dayton Rubber Company shall be referred to herein as "Dayton"; Cordovan Associates, Incorporated as "Cordovan"; and White Stores, Inc. as "White".

QUESTION PRESENTED

The petitioner's statement of the Question Presented contains inaccuracies which should be corrected in order

that this Court will not be misled as to the true nature of the controversy here.

The petitioner states (p. 2), ". . . . the trial judge held that Dayton was not so required" (to accord the associates and approved distributors of Cordovan the same prices which it accorded its other chain store customer, White Stores, Inc.). The District Court actually held that under the valid and enforceable contract between Dayton and Cordovan the prices *did* have to be the same to both customers (see petitioner's Appendix 9a) *unless and until* Dayton unilaterally lowered its prices to one of its customers by giving the lower prices a different name, which (according to the District Court) it apparently was free as a matter of law to do at any time and actually did in the present case.

The petitioner quotes one (No. 28) of the 29 separate findings of the District Court, and states that the Court of Appeals reversed the judgment of the trial court "because it disagreed with that finding." As will be shown herein, however, the Court of Appeals unanimously reversed the judgment of the trial court because of the failure of that court to apply correct legal rules to the undisputed facts.

Because the finding relied upon by the petitioner was ambiguous enough to *allow* a contrary result, the Court of Appeals necessarily had to disagree with any implications of that finding which were contra its unanimous decision on the merits of the case.

Such disagreement does not mean that the Court of Appeals would have reached a different decision even had this finding been upheld, nor does it mean that the Court of Appeals was not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.ed. 746, 766 (1948).

STATEMENT

The sole issue before the District Court and the Court of Appeals in this case was the proper legal interpretation of the term "prices prevailing on date of shipment" in a requirements contract for the sale of automobile tires and tubes between Dayton (its Chain Store Division), the seller, and Cordovan, the purchaser.

Cordovan maintained that this term in its contract with Dayton bound Dayton to charge the associates and approved distributors of Cordovan prices no higher than those charged any other customer of the Chain Store Division of Dayton for the same items. In other words, this phrase incorporated the "one price to all" policy which Dayton had at the time the contract was executed and which had always been in effect throughout the entire course of dealing between the parties.

The trial court found, as a fact, that Cordovan had purchased its requirements of tires and tubes from Dayton since 1947, and that all such sales had been handled by the Chain Store Division of Dayton. (Apdx. 2a) Also since about 1947, Dayton sold tire casings and tubes through its Chain Store Division to White Stores, Inc., and to independent automotive chain stores who purchased a private brand tire and casing owned by Dayton and known as "Road King." (Apdx. 2a) These three — Cordovan, White, and the set of independent businesses which purchased "Road King" tires and tubes — were the only customers of the Chain Store Division since its formation in 1947. (Apdx. 2a)

The trial court found, *as a fact*, that throughout the entire course of dealing between Cordovan and Dayton, since 1947 and until June 1, 1958, the net billing prices for tires and tubes "were identical as between all customers" of the Chain Store Division of Dayton. (Apdx. 3a) The

trial court further found, *as a fact*, that these uniform prices were not accidental but were the result of an actual "pricing policy established and in effect in the Chain Store Division of Dayton Rubber, applicable alike to all customers of such Division, whereby identical base or net billing prices were established for all tires and tubes sold through such Division to all customers thereof." (Apdx. 3a) The trial court found *as a fact* that such prices fluctuated from time to time with industry conditions, generally on a quarterly basis, but that such fluctuations were applied uniformly and identically to all customers and that "this policy" was known to all of the customers of the Chain Store Division. (Apdx. 3a)

In the summer of 1956, Dayton determined to abandon its efforts to promote its "Road King" brand and to concentrate on expanding its chain store business through Cordovan and White. (Apdx. 4a) To protect itself in this regard, Dayton proposed written requirements contracts to Cordovan and White for terms of three years each. (Apdx. 3a)

The two contracts were both prepared by Dayton (Apdx. 4a) at a time when its pricing policy of uniform prices was found by the trial court to be in existence and known to all parties. (Apdx. 3a) The trial court found, *as a fact*, that prior to August 16, 1956 (the date of the meeting of the Board of Directors of Cordovan at which the proposed contract prepared by Dayton was considered), Cordovan "had been told of this uniform pricing policy, and that base or net billing prices for tires and tubes of the same kind, quality and size were identical as between all customers of such Division." (Apdx. 3a) Both contracts, as prepared by Dayton and accepted by the two remaining customers of its Chain Store Division, provided for "prices prevailing on date of shipment." The Cordovan contract (and necessarily, the White contract) was found by the

trial court, as a matter of law, to be valid and binding. (Apdx. 8a) There was no contract or arrangement between Cordovan and White.

White signed its contract for three years, beginning August 1, 1956. Cordovan, after consideration by its Board of Directors and its various associates, signed its contract for a term of two years, beginning November 1, 1956.

Prices to the two customers remained identical for the same items until June 1, 1958, (Apdx. 5a) when Dayton gave White a price reduction of about 10% (Apdx. 7a) without effecting a corresponding reduction in the prices charged to Cordovan for the same items. (Apdx. 8a) The contract between Cordovan and Dayton, calling for "prevailing" prices, was still in effect at that time and remained in effect throughout its term ending October 31, 1958.

In February, 1958, Dayton had granted both White and Cordovan a new bonus program, which in effect gave the two customers larger bonuses by calculating them on the combined purchases of both. (Apdx. 6a) The trial court found that this "concession" was within the terms of the two contracts. (Apdx. 6a)

Cordovan had been negotiating for some time for a new contract to replace the existing one, but the negotiations proved fruitless and the existing contract with Dayton continued in full force and effect to the end of its term. (Apdx. 6a-7a) After reducing its prices to White, Dayton offered Cordovan the same lower prices if it would accept certain conditions. The conditions were wholly unacceptable to Cordovan. (Apdx. 8a) There were *no* conditions to the new, lower prices Dayton gave to White. (Apdx. 7a) White at that time was still obligated by contract to continue purchasing all its requirements of tires and tubes from Dayton for another fourteen months.

The trial court found, as a fact, that Dayton established its prices "on what is known in the trade as a 'cost justification' basis." (Apdx. 2a) It made no findings in explanation of this phrase. Nor did the trial court find that this so-called pricing formula was a pricing "policy" of Dayton, or was known by its customers or was told to Cordovan before or at the time it entered into its contract with Dayton.

When Cordovan ascertained that White was receiving lower prices, it instructed its associates and approved distributors to withhold payment on all tires and tubes shipped by Dayton after June 1, 1958. To resolve the controversy, Dayton brought this Declaratory Judgment action.

Contrary to the statement of petitioner on page 4 of its petition, Dayton never contended that the disputed contract phrase had reference to a pricing formula. The position of the petitioner was that under its contract with Cordovan it could legally charge anything it pleased. This position was put forward by Mr. Goodenberger, witness for the petitioner and its Vice President in charge of sales, tire division, in the following words: "I could have charged them $100.00 a tire." (Appendix to Brief for Appellant, Page 29a.) The trial court held, as a matter of law, that Dayton was bound to charge identical prices to Cordovan and White under its separate contracts with each (Apdx. 9a), but that it was no longer so bound if it chose in its own discretion to change merely *the label* it attached to its internal bookkeeping method of computing prices.

In the course of its detailed findings, the trial court stated that there was no provision, nor were there facts from which an inference could be drawn that Cordovan prices were to be "tied to" White prices "under all circumstances". (Apdx. 8a)

Cordovan on appeal accepted all *facts* found by the District Court and contended that on those facts the decision should be reversed because the trial court ignored certain fundamental rules of contract law and general law. As to the single Finding No. 28, Cordovan pointed out that both it and the judgment of the trial court stemmed from fundamental misapprehensions of Cordovan's case and the law applicable, and, further, that that finding was wholly inconsistent and in conflict with all other special findings of fact made by the trial court, and did not preclude a decision for Cordovan. Cordovan, after all, never contended its prices were "tied to" White's prices, but, rather, that it was entitled to the lowest prices charged by Dayton to any other customer for the same items.

The Court of Appeals, to complete the quotation given by petitioner on page 7 of its petition, observed that the decisive question was the contention of Cordovan "that the 'prevailing prices' clause in its contract with Dayton Rubber Company entitled it to the same prices given by appellee to White Stores under an identical pricing clause in the contract between the rubber company and White Stores; and that all parties understood the prices were to be the same to each of the two large chain-store customers." The citation of *Chandler* v. *United States*, 226 F.2d 403, 405 (7th Cir., 1955) by the Court of Appeals shows that the Court viewed this decisive question as one of *law*.

While the Court of Appeals did state that it was free to disagree with the finding in issue, it is incorrect to claim, as petitioner does, that the per curiam decision of the Court of Appeals was the result of a simple "disagreement" with the District Court concerning factual inferences which could be drawn from undisputed facts. The Court of Appeals held that the "manifest meaning of the language used" in the contract, reinforced by the undisputed *actions* of the parties and the "uniform pricing

policy" of the petitioner, compelled, in effect, a decision for Cordovan, *under applicable rules of law*. (Apdx. 16a-17a)

The Court of Appeals did not "disagree", as petitioner claims, with the District Court on those matters. The District Court made no statement at all concerning the "manifest meaning of the language used", except perhaps in its "Conclusions of Law and Fact" where it held that the use of the term "prevailing prices" in the same way in both the Cordovan and White contracts meant that "White prices and Cordovan prices would be the same." (Apdx. 9a)

It can hardly be said that the Court of Appeals disagreed with the District Court as to the uniform pricing policy of the petitioner, since it relied upon the findings of the District Court (Apdx. 3a) as to the existence of this policy. As to the practical interpretation placed on the contract by the parties, the Court of Appeals merely recited the undisputed facts found by the District Court. It was the *actions* of the parties, not any secret intent regarding magic phrases with no known meaning (such as "Cost Justification"), which, under the precedents cited by the Court of Appeals, clearly revealed the practical, i.e., working, interpretation put on the contract by the parties.

Incidentally, neither the facts found by the District Court nor anything in the entire record indicates any of the parties ever attached any particular importance to the phrases "Cost Justification" or "based on cost". Dayton did not please White by offering it "based on cost" prices. It gave White *lower* prices. White did not know or even care what jargon clothed these lower prices. In his deposition, Mr. White, President of White Stores, Inc., in response to a question as to whether White and Dayton entered into a new "pricing arrangement" in May or June of 1958, stated: "Well, I couldn't say that we en-

tered into a new pricing arrangement, but I can say that Dayton . . . presented us with a new low price that was approximately 10½ or 10 and three-quarters per cent lower price than we had been buying at." (Appendix to Brief for Appellant, p. 36a)

REASONS FOR NOT GRANTING A WRIT IN THIS CASE

I. Conflict Within a Circuit is not a Ground for Granting a Writ of Certiorari.

The petitioner dwells at length on an alleged conflict between different judges of the Sixth Circuit on the question of whether Rule 52(a), F.R.Civ.P., applies to inferences and conclusions drawn from undisputed facts. Of the twenty-two cases cited by petitioner as illustrating such a conflict in the Courts of Appeals, no less than twelve are from the Sixth Circuit alone.[1] It is settled, however, that "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A, 541, 552 (1958).[2]

Such cases in the Sixth Circuit, moreover, as would appear at first glance to be conflicting, actually resolve them-

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[1] Willett v. *C.I.R.*, 277 F.2d 586 (6th Cir. 1960); *United States* v. *Allinger*, 275 F.2d 421 (6th Cir. 1960); *Wright* v. *C.I.R.*, 274 F.2d 883 (6th Cir. 1960); *C.I.R.* v. *Consolidated Premium Iron Ores, Limited*, 265 F.2d 320 (6th Cir. 1959); *Gudgel* v. *C.I.R.*, 273 F.2d 206 (6th Cir. 1959); *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F.2d 304 (6th Cir. 1958); *Wise* v. *C.I.R.*, 261 F.2d 354 (6th Cir. 1958); *Yunker* v. *C.I.R.*, 256 F.2d 130 (6th Cir. 1958); *Rich* v. *Pappas*, 229 F.2d 308 (6th Cir. 1956); *Seagrave Corp* v. *Mount*, 212 F.2d 389 (6th Cir. 1954); *E. H. Sheldon and Co.* v. *C.I.R.*, 214 F.2d 655 (6th Cir. 1954); *Letcher County* v. *DeFoe*, 151 F.2d 987 (6th Cir. 1945).

[2] It would seem that the proper way to resolve such a conflict, if one exists, is that adopted by the Seventh Circuit, which recently sat *en banc* to settle the scope of review applicable to patent litigation. *Armour and Co.* v. *Wilson & Co.*, 274 F.2d 143 (7th Cir. 1960).

se'ves along the same lines as will be discussed later in relation to cases of alleged conflict from other circuits.

II. The Alleged Conflict in the Sixth Circuit is no longer of importance.

On June 13, 1960, this Court rendered its decision in *Commissioner* v. *Duberstein*, — U.S. —, as petitioner itself has pointed out. In the course of that opinion this Court held that the "clearly erroneous" rule, F.R.Civ.P., 52(a), "applies also to factual inferences from undisputed basic facts . . .". On August 10, 1960, the Court of Appeals for the Sixth Circuit rendered its decision in *Commissioner* v. *Spermacet Whaling & Shipping Co., S/A*, — F.2d — (not yet reported) (See Appendix). In the course of that opinion, Judge Miller took explicit note of the alleged conflict of which petitioner complains. He then cited and quoted from the opinion of this Court in the *Duberstein* case that "factual inferences from undisputed basic facts" receive the protection of Rule 52(a), F.R.Civ.P. Judge Miller recognized the *Duberstein* decision as settling any conflict concerning factual inferences, whether they be ultimate facts or not, drawn by a trial court from undisputed basic or evidentiary facts (Apdx. 6b-8b).

Judge O'Sullivan, who was a member of the panel which heard and decided the present case, joined in the opinion of Judge Miller in the *Spermacet* case.

There was a dissent by Judge Simons but it was based upon a close analysis of the facts and did not take issue with the holding of Judge Miller regarding the effect of the opinion of this Court in the *Duberstein* case. Judge Simons, it may be noted in passing, was a member of the panels which decided *Rich* v. *Pappas*, 229 F.2d 308 (6th Cir. 1956) and *Wright* v. *C.I.R.*, 274 F.2d 883 (6th Cir

1960), both being leading cases for the "correct" view on the scope of review under Rule 52(a), F.R.Civ.P.

It thus appears that the *Duberstein* case is having exactly the effect in the Sixth Circuit petitioner claims it should have, and there is no need for this Court to reiterate its stand again, twice within the same sixth month period, on the same issue, even if the petitioner were correct (which it is not) in claiming the Court of Appeals committed error in the present case.

III. The alleged conflict between the Circuits on the issue presented by petitioner dissolves upon examination of the cases cited by petitioner.

Of the remaining ten cases cited in the petition to prove a present conflict worthy of resolution by this Court, six[3] are in full accord with the correct rule, as settled by this Court, regarding factual inferences drawn from undisputed facts. Thus a total of four cases[4] from four different circuits are left as "proof" of a present conflict.

One of these circuits is the Seventh Circuit, which in *Chicago, B. & Q. R. Co.* v. *United States,* 221 F.2d 811 (7th Cir. 1955), stated that where the facts were stipulated and in documentary form the Court of Appeals could reach its own conclusions. The Court there also held, however, that upon the authority of the Supreme Court it could review a question of tariff interpretation as a matter of law. The Court then reversed the lower court

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[3] *Texas Co.* v. *R. O'Brien Co.*, 242 F.2d 526 (1st Cir. 1957); *Coleman* v. *Sears, Roebuck & Co.*, 238 F.2d 206 (8th Cir. 1956); *Bishop* v. *United States*, 223 F.2d 582 (D.C. Cir. 1955), 350 U.S. 961; *Hycon Manufacturing Co.* v. *H. Koch & Sons*, 219 F.2d 353 (9th Cir. 1955), cert. den., 349 U.S. 953, 75 S.Ct. 881, 99 L.Ed. 1278 (1955); *Kaye* v. *Smitherman*, 225 F.2d 583 (10th Cir. 1955); *Central Ry. Signal Co.* v. *Longden*, 194 F.2d 310 (7th Cir. 1952).

[4] *United States* v. *One 1950 Buick Sedan*, 231 F.2d 219 (3rd Cir. 1956); *Kraft Foods Company* v. *C.I.R.*, 232 F.2d 118 (2nd Cir. 1956); *Chicago Burlington & Quincy R. Co.* v. *United States*, 221 F.2d 811 (7th Cir. 1955); *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954).

upon the authority of an analogous case. The precedent value in tariff rate decisions is of obvious importance, and the court there was fully justified in treating the matter as one of law.

In any case, the Seventh Circuit may no longer be cited as conflicting with the other circuits on the point in question. See *Snorgrass* v. *Sears, Roebuck & Co.*, 275 F.2d 691 (7th Cir., March 1, 1960), which the petitioner failed to note in its petition.

Three cases remain to indicate a present conflict. One of these is *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954). The Court there said that it was free to draw its own conclusions where the questioned finding "is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts." (210 F.2d 615, 619) The Court did *not* say that *factual* inferences were not to be accorded the protection of Rule 52(a), F.R.Civ.P. It was merely stating in a different way the rule that where the so-called "ultimate fact" is "reached by processes of legal reasoning from, or the legal significance of, the evidentiary facts, it is subject to review free from the restraining impact of the so-called 'clearly erroneous' rule." *Gamble* v. *Commissioner*, 242 F.2d 586 (5th Cir. 1957).

The Fifth Circuit, incidentally, is one of those which could have been cited by petitioner as being on the "correct" side of this question. See *United States* v. *Kaplan*, 277 F.2d 405 (5th Cir. 1960) and *United States* v. *Schultetus*, 277 F.2d 322 (5th Cir. 1960), both decided on April 18 of this year.

In any case, the Ninth Circuit in *Stevenot* v. *Norberg*, *supra*, did not say that it disagreed with the questioned finding of the trial court. It reversed the trial court *on a point of law*, while holding that the questioned finding did not have the effect claimed for it by the appellees

because it had to be read in connection with the stated reason of the lower court for its legally incorrect decision. Thus, the point proved immaterial in that case.

Of the two remaining cases which petitioner claims indicate a present conflict, both were decided back in 1956. In one, *Kraft Foods Company* v. *Commissioner*, 232 F.2d 118 (2nd Cir. 1956), the Court of Appeals admittedly said that where the evidence before the Tax Court consists of stipulated facts it was free to draw its own "inferences of ultimate fact from the record." (232 F.2d 118, 122) But the Court there reversed the Tax Court only after an exhaustive review of the facts and the application of a different legal rule to them than that used by the Tax Court.

In *United States* v. *One 1950 Buick Sedan*, 231 F.2d 219 (3rd Cir. 1956), the Court of Appeals also applied a different legal standard to the facts than that used by the District Court, and held that the facts "definitely established" the ultimate conclusion which the District Court had not found. The Court of Appeals thus found the ultimate finding of the trial court clearly erroneous whether it used those two words or not.

These cases have been analyzed to point out that the alleged conflict which petitioner points to is primarily one of semantics. Space does not permit presentation here of an extended analysis of the cases on the so-called "correct" side of the issue, but upon careful examination it will be apparent that, just like the four cases analyzed above, there is not the slightest indication any of these cases would have been decided differently no matter which side the Court might have taken regarding inferences from undisputed facts. This is true even in the Sixth Circuit, as dramatically illustrated by the concurrence of Judge Miller, one of the most outspoken proponents of the view that Rule 52(a) applies to factual inferences, in the decision of the court in *Yunker* v. *C.I.R.*, 256 F.2d 130 (6th

Cir. 1958), frequently cited as a leading case for the opposite view.

The most recent of the so-called "conflicting" decisions from other circuits occurred back in 1956. The recent cases are in full accord with the holding of this Court that factual inferences and conclusions are protected by Rule 52(a), F.R.Civ.P. All the argument over the problem since 1956 seems to have taken place merely among the judges of the Sixth Circuit alone, and even here it appears, judging from *Commissioner* v. *Spermacet Whaling & Shipping Co., S/A*, — F.2d — (6th Cir., August 10, 1960), that the decision of this Court in *Commissioner* v. *Duberstein*, — U.S. —, is having the salutary effect of resolving any differences among the various judges of the Sixth Circuit.

The issue in all these cases really resolves itself down to the question of *what* is a *factual* inference, not whether Rule 52(a) F.R.Civ.P., applies to such inferences. As Justice Frankfurter has said, "Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made." *Baumgartner* v. *United States*, 322 U.S. 665, 671, 64 S. Ct. 1240, 1243, 88 L. Ed. 1525, 1529.

It is respectfully submitted that an analysis of all the cases cited by petitioner as evidence of a conflict will reveal very little, if any, conflict when classified on the basis of the particular issues involved and the particular results reached by the reviewing court. Such conflict as may still exist is largely a matter of semantics, marring the tidiness of hornbook law perhaps, but irrelevant to the actual decisions reached on particular issues and cases.

A problem of this sort, moreover, is not one that promotes any uncertainty in the law office when a client seeks advice. It does not affect at all the guidance which the law is expected to give to people planning their affairs

and business transactions. It is submitted that the prime function of this Court is to resolve conflicts between the Courts of Appeals which make uncertain this guidance which law should afford people.

We see no reason for this Court to concern itself here with an issue of declining importance, flickering along only in one Circuit, concerning only one finding of a "fact" which is not inconsistent with the decision of the Court of Appeals, and especially after this Court has spoken so recently (and apparently effectively) on this very question in *Commissioner* v. *Duberstein*, — U.S. — decided June 13, 1960.

IV. The Court of Appeals did not commit any error in its decision in this case.

A brief in opposition to a petition for certiorari is no place for an extended argument on the merits of the case, nor do we intend to make one here. The assertion of the petitioner, however, that the Court of Appeals committed manifest error justifying a reversal on the merits without even the opportunity of submitting briefs on the case impels us to point out, in summary fashion, the grounds for the decision below.

The Court of Appeals simply took the plain language of the contract and all relevant facts found by the trial court and enforced the contract according to its "manifest meaning," holding that it would be "illogical" to allow a seller to charge one of its two customers a lower price for the same item, when both have contracts to receive goods at "prevailing prices." (Apdx. 15a-16a) This interpretation of the manifest meaning of the language used in the contract was reinforced by the *actions* of the parties under the contract and during their entire course of dealing (approximately nine years) before entering into

this contract. Under the law both as settled in the Sixth Circuit and the State of Ohio, this practical interpretation of the contract by the parties carries great weight, if indeed it does not control. The District Court had completely ignored this rule of law in its decision, although it had found all the necessary facts to make it applicable.

Without elaborating on the matter at this time, we wish to point out that Cordovan demonstrated in its brief and oral argument before the Court of Appeals that not only is the interpretation of the contract advanced by Cordovan (and accepted by the Court of Appeals) the proper and required one under the law and upon the facts as found by the District Court, but also that the various interpretations advanced by petitioner and the District Court constituted, to say the least, novel innovations in contract law that would render the entire contract void for want of mutuality.

The petitioner claims that the Court of Appeals fished "in the troubled waters of conflicting inferences." Actually, the only angling being done here is being done by the petitioner, who tries very hard to go behind the facts found by the District Court and search out bits of evidence which, it claims, the District Court "undoubtedly had in mind" or "may also have had in mind" when it promulgated Finding No. 23. It is clear, however, that the District Court made a very simple statement — that there were no facts from which an inference could be drawn that Cordovan prices were "to be tied" to White prices "under all circumstances"

The finding *does not* hold that Cordovan prices were not to be the same as White's *under the circumstances of this case*. Nor does it hold, as petitioner tries very hard to suggest, that Cordovan was not entitled to the prevailing price, which is fixed as the lowest price charged any other customer of Dayton for the same items. For

instance, suppose Dayton had raised White prices. There is no evidence, as the District Court found, that the Cordovan prices would then have to go up as they would if they were "tied to" White prices.

Actually, White could have gone out of business and Dayton acquired a dozen new customers, but the contract between Dayton and Cordovan would have continued to subsist as valid and enforceable.

While the particular finding which the petitioner complains the Court of Appeals merely "disagreed" with *can* be construed, if read in certain ways, as contrary to the decision of the Court of Appeals, is there any doubt from the opinion of the Court of Appeals that all three judges found such finding, so construed as petitioner claims, to be "clearly erroneous"? Does the Court have to use those exact words? Is it not clear that the entire Court was left with the definite and firm conviction that a mistake had been made by the District Court in its application of the law to the facts as found by that court?

Even if the petitioner is correct, which we certainly do not concede and are prepared to argue if necessary, a hearing by this Court would, for the reasons pointed out above, be of importance only to the two private parties involved in the case. The petitioner has had its day in court.

CONCLUSION

We submit that the Court of Appeals committed no error in its decision; that a reversal of the decision without further briefs or argument would result in a manifest injustice to respondent; that for the reasons advanced herein there is no conflict among the Courts of Appeals worthy of the attention of this Court; and that any further statements by this Court on the problem of semantics which this petitioner is attempting to raise here are unnecessary.

We respectfully request this Court to deny the petition for certiorari.

Respectfully submitted,

RICHARD W. GALIHER
1215 19th Street, N. W.
Washington, D. C.
MORTON HONEYMAN
324 Washington Avenue, S. W.
Roanoke, Virginia
ROBERT F. YOUNG
HARSHMAN, YOUNG, COLVIN & ALEXANDER
1201 Third National Building
Dayton, Ohio
Attorneys for Respondent

APPENDIX

No. 13887

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SPERMACE[illegible] WHALING & SHIPPING CO., S/A,
Respondent.

Petition for Review of the Decision of the Tax Court of the United States
(Decided August 10, 1960.)
(Filed August 10, 1960.)

Before SIMONS, Senior Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The respondent, Spermacet Whaling & Shipping Co., is a corporation organized under the laws of the Republic of Panama. During the period of April, 1947, through the latter part of January, 1948, it participated in a fishing expedition for sperm whales and the production of sperm oil off the western coast of South America. It received from these operations during its fiscal year ending April 30, 1948, net income of $924,979.72. The respondent, as a foreign corporation, contends that not any of such net income is taxable to it by the United States.

The Commissioner ruled otherwise and made a deficiency assessment of $351,492.29.

The facts are most interesting, but lengthy. They are set out in detail in the Findings of Fact and Opinion of the Tax Court, reported at 30 T. C. 618, to which reference is made. The following summary is sufficient for our present purposes.

Sperm oil is obtained from the sperm whale and is used for industrial purposes, primarily as an additive to lubricants. In 1946 sperm oil was in short supply, primarily because the Norwegian whaling fleets had been depleted by enemy action during World War II, and because the whaling fleets then in operation were required to be used principally for the production of edible oils. Norway was the largest producer of whale oil in the world.

A typical whaling expedition to obtain crude sperm oil consists of a large mother or factory ship and a number of killer boats. The killer boats are used to catch the sperm whales and to tow them to the factory ship where the sperm oil is extracted. The operation is carried on without operational contact with a base station located in coastal waters.

Archer-Daniels-Midland Company, a Delaware corporation, hereinafter called A.D.M., was engaged in the business of purchasing, processing and selling certain special oils, including sperm oil. Because of the limited supply it faced a critical business need. Smith, its Executive Vice-President in Cleveland, Ohio, contacted Jahre, one of Norway's leading whalers, for the purpose of organizing a new whaling company to engage in the production of sperm oil. Jahre caused the Falkland Shipowners Limited, a British corporation, which he indirectly controlled, to acquire from the British Government an old factory ship called the *Anglo Norse*, which required a considerable expenditure of money to put it in suitable condition. He had at his disposal suffi-

cient killer boats to outfit a whaling expedition. After considerable negotiations, Jahre, Smith and others, in December, 1946, caused the respondent to be incorporated under the laws of Panama. It held its first meeting of its board of directors in New York City on December 12, 1946.

Jahre returned to Norway and attempted to obtain for respondent a charter of the *Anglo Norse* from Falkland. Since Falkland was a British corporation, it could not execute such a charter to the respondent, a foreign corporation, without the approval of the British Government. The British Government refused to consent on the ground that Panama, the country of respondent's incorporation, had not subscribed to the International Whaling Agreement.

Jahre proposed that A.D.M. charter the *Anglo Norse* and then permit respondent to manage the sperm oil expetition, but A.D.M. refused to be a party to such an arrangement. After discussing the situation among themselves, respondent's Norwegian shareholders proposed to Smith that Smidas Company, Inc., hereinafter called Smidas, charter the vessel and then work out some definitive relationship with respondent for the conduct of the expedition. Smidas was an Ohio corporation, incorporated on February 19, 1945, engaged in promoting export business of certain technical items. At the time of its incorporation Smith acquired 54.5 per cent of its capital stock. After some negotiation, Smidas accepted the proposal. On or about February 4, 1947, a "bare boat charter party" was negotiated in Europe and there signed by Falkland as the owner of the *Anglo Norse*, by which Smidas chartered the vessel for a period of four years, with options to renew for further periods totaling six years, for $50,000.00 per annum.

By contract dated March 8, 1947, between Smidas and respondent, respondent assumed all of the obligations of

Smidas under the charter party and agreed to organize, equip and manage the whaling expedition. It was to receive for its services and the obligations assumed, the proceeds to be received by Smidas from the sale of the oil, after deducting from such proceeds the sum of $25,000.00 and certain expenses incurred by Smidas in the sale and delivery of the oil.

By contract dated May 26, 1947, Smidas sold the sperm oil produced by the whaling expedition to A.D.M., with the provision that title to the sperm oil would pass to A.D.M. at the time that the sperm oil was delivered to A.D.M. in New York City.

The *Anglo Norse* was reconditioned and equipped for the contemplated expedition entirely in Norwegian shipyards, with the contracts therefor being negotiated, executed, and carried out in respondent's behalf by Norwegians in Norway. All officers and all members of the crews of the several vessels, aggregating about 300 men, were Norwegian and were employed pursuant to contracts negotiated in respondent's behalf in Norway. Certain fuel oil purchases in the United States were arranged for by Smith at the direction of respondent's Norwegian management, to be delivered to the *Anglo Norse* off the western coast of South America.

The *Anglo Norse* and the seven killer boats left Norway on the sperm oil expedition in April, 1947, proceeded to the fishing grounds off the western coast of South America, where fishing for sperm whales and the production of sperm oil was commenced on May 20, 1947. These operations continued until about January 4, 1948, at which time the killer boats returned to Norway. During this entire period the vessels were in constant contact with respondent's management in Norway via shortwave radio and remained under Jahre's supervision.

About half of the sperm oil produced was delivered in October, 1947, to a transport which brought a load of fuel oil to the *Anglo Norse*, and after delivering the fuel oil received the sperm oil from the floating factory, and delivered it to A.D.M. in New York. The balance of the sperm oil was delivered to A.D.M. in New York by the *Anglo Norse* about January 27, 1948. After unloading her cargo of sperm oil the *Anglo Norse* returned to Norway.

Respondent maintained a bank account at the Guaranty Trust Co. of New York, which it opened about February 8, 1947, with a deposit of $125,630.11. Deposits to that account included loans by shareholders and individuals to respondent and the money paid by A.D.M. for the purchase of the sperm oil in the amounts of $1,191,963.84 and $2,287,668.26 for the respective two deliveries, after proper provisions by A.D.M. for use of part of the proceeds to discharge lien indebtedness. The payments from that account consisted, in general of amounts paid at the direction of the Norwegian management to discharge obligations of respondent requiring payment in United States dollars, payments to or for the personal benefit of respondent's Norwegian shareholders (such payments being considered loans to those shareholders), repayment of loans, transfer of funds to Norwegian accounts for use by the Norwegian management, and for the payment of a tanker which was built and purchased in Europe and whose operations are not involved in this controversy. Smith acted as Treasurer of the respondent and in addition to drawing the checks on the Guaranty Trust Co. account maintained financial records in accordance with standard accounting practice.

Respondent did not at any time prior to April 30, 1948, have an office in the United States, nor was it qualified to do business in any state in the United States. It did not at any time have any United States employees. Smith was its sole officer in the United States. Respondent had an office

in Norway, in which and from which it directed and managed its operations. Its board of directors held meetings in New York City on September 29, 1947, October 2, 1947, January 13, 1948, and February 2, 1948, to discuss and approve or ratify corporate procedures and policies. These meetings were called in New York City because it better suited the personal convenience of the directors to come there.

The basis for the assessment was the finding by the Commissioner that under the foregoing facts the respondent was a foreign corporation engaged in trade or business within the United States and that its gross income from the sperm oil expedition was from sources within the United States, thus making the net income taxable income to the respondent under the provisions of Section 231 (b) and (c), Internal Revenue Code of 1939.

On petition to the Tax Court for a redetermination of the deficiency, the Tax Court, with four judges dissenting, held that the respondent was not a resident foreign corporation engaged in trade or business within the United States and that its net income was accordingly not taxable as provided in Sections 14 (c) (1) and 15, Internal Revenue Code of 1939. The Commissioner seeks a review of the decision of the Tax Court.

There is no dispute about the foregoing basic facts, many of them being stipulated. From these facts the Tax Court found that the management contract between respondent and Smidas, and the sales contract between Smidas and the purchaser, A.D.M., were bona fide contracts serving a real business purpose, and were in fact what they appeared to be in form. It pointed out that Smidas was not a corporation organized for tax purposes, or for the particular part it played in this transaction. On the contrary, it had been in existence for some time, had ample assets and was at times engaged in various business activities. The Tax

Court, recognizing the contract of sale between Smidas and A.D.M., said, "We think the facts here clearly show that petitioner was not the owner and seller of the oil."

The fact that the transaction took the form it did for the purpose of avoiding taxes, even if we assume such to be the case, is not sufficient to permit the Court to treat as taxable a transaction which in form is nontaxable, provided the component parts of the transaction are bona fide and not a sham. *United States* v. *Cummins Distilleries Corp.*, 166 F. 2d 17, 20-21, C.A. 6th; *Chamberlin* v. *Commissioner*, 207 F. 2d 462, 468, C.A. 6th, cert. denied, 347 U.S. 918; *United States* v. *Cumberland Public Service Co.*, 338 U.S. 451, 455. The Supreme Court stated in the *Cumberland Public Service Co.* case, "It is for the trial court, upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs. Here as in the *Court Holding Co.* case we accept the ultimate findings of fact of the trial tribunal." See also: *United States* v. *Cummins Distilleries Corp.*, supra, 166 F. 2d 17, 20 C.A. 6th. Likewise, we accept the findings of the Tax Court in the present case that the contracts involved were bona fide ones, with the result that Smidas, not the respondent, was the owner and seller of the oil.

The Tax Court also found that "Upon the entire record, we are convinced that petitioner was not engaged in any substantial, regular, or continuous ordinary business activity in the United States." This is a finding of fact which we believe is not clearly erroneous and which we are required to accept.

Based upon that finding, the Tax Court concluded that the taxpayer was not "engaged in trade or business within the United States" within the meaning of Section 231 (b), Internal Revenue Code of 1939. Whether a foreign corporation is engaged in trade or business within the United States is a question of fact. *Jan Casimir Lewenhaupt* v.

Commissioner, 20 T. C. 151, 162, affirmed, 221 F. 2d 227, C.A. 9th; *Consolidated Premium Iron Ores, Ltd.* v. *Commissioner*, 28 T. C. 127, 150, affirmed, without reference to this question, 265 F. 2d 320, C.A. 6th; *European Naval Stores Co.* v. *Commissioner*, 11 T. C. 127, 132; *Scottish American Investment Co., Ltd.* v. *Commissioner*, 12 T. C. 49, 54. The fact that the ultimate finding is a conclusion drawn from undisputed or established subsidiary facts does not change such a finding from one of fact to a conclusion of law. Being a finding of fact it is not to be set aside unless clearly erroneous. *Section 7482, Internal Revenue Code of 1954; Rule 52(a), Rules of Civil Procedure; United States* v. *Gypsum Co.*, 333 U.S. 364, 394; *Commissioner* v. *Consolidated Premium Iron Ores, Ltd.*, supra, 265 F. 2d 320, 326, C.A. 6th.

We recognize that there are a number of decisions in several of the circuits, including our own, which hold that where the subsidiary facts are undisputed and no question of credibility is involved, the Court of Appeals is as well qualified as the trial judge to draw inferences and conclusions therefrom, and such inferences and conclusions of the trial judge can be reviewed by the Court of Appeals free of the limitation of the "clearly erroneous" rule. *Seagrave Corp.* v. *Mount*, 212 F. 2d 389, 394, C.A. 6th; *E. H. Sheldon & Co.* v. *Commissioner*, 214 F. 2d 655, 658, C.A. 6th. However, in *Rich* v. *Pappas*, 229 F. 2d 308, 313, C.A. 6th, we concluded that in view of the ruling of the Supreme Court in *United States* v. *Gypsum Co.*, supra, 333 U.S. 364, 394, the conclusions of the trial judge, even though drawn from undisputed facts, were findings of fact which were not to be set aside unless clearly erroneous. We followed this new ruling, with one judge dissenting, in *Dixie Sand & Gravel Corp.* v. *Holland*, 225 F. 2d 304, 308, 314, C.A. 6th, and again in *Commissioner* v. *Consolidated Premium Iron Ores, Ltd.*, supra, 265 F. 2d 320, 326, C.A. 6th. However,

some members of the Court have been of the opinion that the rule as stated in the earlier *Seagrave Corp.* and *E. H. Sheldon & Co.* cases was the correct and better rule and have followed it in recent cases. *Yunker* v. *Commissioner*, 256 F. 2d 130, 133, C. A. 6th; *Gudgel* v. *Commissioner*, 273 F. 2d 206, 209-210, C. A. 6th.

The Supreme Court has very recently expressed its opinion in what we believe is an analogous situation. In *Commissioner* v. *Duberstein*, decided June 13, 1960, the question presented was whether under certain facts and circumstances the transfer of a Cadillac automobile from one businessman to another constituted a "gift" within the meaning of the statute which excludes from the gross income of an income taxpayer "the value of property acquired by gift." The Court stated that decision of the issue must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case, that primary weight in this area must be given to the conclusions of the trier of fact, and although it may not satisfy an academic desire for precision in this area, the question remained basically one of fact, for determination on a case-by-case basis. The opinion states, "One consequence of this is that appellate review of determinations in this field must be quite restricted. . . . Where the trial has been by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' *Fed. Rules Civil Proc. 52(a).* . . . *The rule itself applies also to factual inferences from undisputed basic facts*, . . ., as will on many occasions be pre ented in this area. . . . And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I.R.C. Sec. 7482 (a)." (Emphasis added.) The opinion refers to its previous ruling in *United States* v. *Gypsum Co.*, supra, 333 U. S. 364, 394, which we previously considered controlling in *Rich* v.

Pappas, supra, 229 F. 2d 308, 313, C.A. 6th. Accordingly, in the present case, we construe the ultimate findings of the Tax Court, drawn from undisputed or established subsidiary findings, as findings of fact which are not to be set aside unless clearly erroneous.

In our opinion, the conclusions of the Tax Court that the respondent was not engaged in trade or business within the United States is not clearly erroneous and must be accepted on this review. As the Tax Court pointed out, the business in which respondent was engaged, treating the contracts between the parties as bona fide contracts serving a real business purpose, was that of managing the expedition for Smidas, and its activities which produced the income in question took place almost entirely on the high seas or in Norway. It was not, during some substantial portion of the taxable year regularly and continuously transacting a substantial portion of its ordinary business in the United States, which is a necessary requirement before a taxpayer can be found to be "engaged in trade or business within the United States." *Lewellyn* v. *Pittsburgh, B. & L. E. R. Co.*, 222 F. 177, 185-186, C.A. 3rd; *European Naval Stores Co.* v. *Commissioner*, supra, 11 T. C. 127, 133; *Scottish American Investment Co., Ltd.* v. *Commissioner*, supra, 12 T. C. 49, 59; *Linen Thread Co., Ltd.* v. *Commissioner*, 14 T. C. 725, 736.

The decision of the Tax Court is affirmed.

SIMONS, Senior Judge, (dissenting). Out of the organization, operation and activities of the respondent in a whaling venture which resulted in very substantial profit, there emerged a tax controversy culminating in a determination by the petitioner of a deficiency in respondent's income tax return for the fiscal year ending April 30, 1948. The Tax Court held respondent's income from the venture not taxable, as provided in Sections 14 (c) (1) and 15 of the In-

ternal Revenue Code of 1939. The petitioner seeks review of that holding.

The controlling question is whether the respondent, during its taxable year, was a "resident . . . foreign corporation engaged in trade or business within the United States," as that phrase is used in Section 231 (b) I. R. C. of 1939 as amended and whether the respondent, during the tax year, derived "gross income from sources within the United States," as that phrase is used in Section 231 (c) I. R. C. of 1939. The Tax Court supported its conclusion by lengthy and detailed findings of facts and I accept the evidentiary facts as found. Whether they support the legal conclusion at which the Tax Court arrived is the heart of the controversy. I shall endeavor to summarize the facts as best I may.

The purpose of the venture was to obtain sperm oil, which is obtained from the sperm whale and is used for industrial purposes, primarily as an additive to lubricants. Norway was the largest producer of whale oil in the world and an American corporation styled Archer-Daniels Midland Company, hereinafter referred to as ADM, was the largest refiner of sperm oil in the world. In 1946, sperm oil was in short supply, primarily because the Norwegian whaling fleets had been depleted by enemy action during World War II and because whaling fleets then in operating condition were required for other purposes. Werner G. Smith, a citizen of the United States residing in Cleveland, was a director and executive vice president of ADM. He was its highest paid officer and was in charge of the division of its business known as the Werner G. Smith Company. This had been owned and operated by Smith independently but had been absorbed by ADM with Smith remaining in an executive capacity. The nature of its business required that ADM make long time commitments to its customers and so it sought to maintain large inventories and to

establish assured sources of supply. During the period here involved, there was a great demand for sperm oil and a limited supply because of which ADM faced a critical business need. In an effort to meet it, Smith contacted two Norwegian citizens by the names of Hans Bull Ovrevik and Magnus Konow. Hans Bull, as Ovrevik was known, was a broker in sperm oil and Konow was a shipowner and a former manager of a Norwegian whaling company.[1] These individuals, in turn, approached Anders Jahre, one of Norway's leading whalers, to inquire whether he would be interested in organizing a new whaling company to engage in the production of sperm oil. They indicated that they would like to join Jahre in such a venture and that Smith in the United States would be interested, if by that method he could secure sperm oil for ADM. Jahre was willing to organize a company but suggested that it would be necessary first to secure a suitable factory ship.

Thereafter, Jahre caused the Falkland Shipowners Limited, a British corporation which he controlled, to acquire from the British government an old factory ship called the "Anglo-Norse." Jahre had at his disposal sufficient "killer boats" to outfit a whaling expedition. On June 22, 1946, Jahre prepared a memorandum which he circulated among the parties interested in the proposed whaling expedition and, as a result, Smith went to Europe, met with the others in Norway, where a memorandum was initialed which provided that an operating company be formed, that the capital stock of the company ($200,000.00) be subscribed 40% by Smith and 60% divided among the others; that the stockholders would lend the company $200,000.00 in proportion to their stockholdings, that a syndicate be formed composed of the stockholders, that the entire production of sperm oil by the operating company would be sold to the syndicate, and then resold to the Smith Division of ADM, and that

[1] Konow later retired from the project.

ADM would lend the new company up to $500,000.00. Upon Smith's return to the United States, he discussed the proposed agreement with his attorney, Clayton A. Quintrell, who objected to the syndicate arrangement and it was abandoned.

Meanwhile, the price of sperm oil in the world markets had increased substantially and the labor and reconversion of the Anglo Norse found to cost more than anticipated so the Norway parties advised that oil could not be sold to ADM for $280.00 per ton. After consulting with the president of ADM, Smith indicated to the Norwegians that ADM would be willing to pay $320.00 per ton. Early in December, Jahre, Bull and Smith met in New York City and caused the respondent to be incorporated under the laws of the Republic of Panama. Jahre, Bull and Smith became its directors. They held their first meeting in New York City. The Tax Court found that Smith made his investment in the respondent in order to obtain an adequate supply of sperm oil for ADM.

At the first meeting of the directors, Jahre, acting for the respondent in New York, signed a sales contract between the respondent, as seller, and ADM, as buyer. While this contract provided that title to all sperm oil produced by respondent should pass to ADM upon the placing of oil in the tanks of the factory vessel, the proposed sales contract was never signed by ADM and never had operative effect. Shortly thereafter, on December 12, 1946, Jahre, in Norway, sought to formalize an arrangement with respect to the "Anglo Norse" by obtaining a charter for the ship from Falkland. Since the latter was a British corporation, it could not execute such charter to a foreign corporation without the approval of the British Government. The latter refused its consent on the ground that Panama had not subscribed to the international whaling agreement.

This decision jeopardized the entire sperm oil venture. Jahre first proposed that ADM charter the "Anglo Norse" but ADM refused to be a party to such arrangement. The respondent's Norwegian shareholders then proposed to Smith that the Smidas Company, Inc. charter the vessel and work out some relationship with the respondent for the conduct of the expedition. Smidas accepted the proposal.

This is the first reference to Smidas in the court's factual narrative and I digress for a moment. Smidas is an American export corporation, formed in 1945. Smith owned 54.5% of its stock acquired at its incorporation and was also its Secretary-Treasurer. Its business was to promote exports of certain technical items and its income was derived from commissions and fees. Nothing in the findings indicates that Smidas was active, or even interested in sperm oil, or that it participated in any way in the organization of the respondent. It was, however, available to Smith by reason of his controlling interest. There is no evidence or finding that Smidas contributed anything to the organization of the respondent, or received any part of the purchase price from ADM.

I return to the Tax Court's narrative. Smidas authorized a contract to be signed by Smith, as its Secretary-Treasurer, to charter the "Anglo Norse" and it was chartered on or about February 5, 1947, in its name. During the fiscal year, various credit arrangements were worked out by the respondent. Jahre negotiated for it a credit of 300,000 British pounds from Lazard, a London banker. Additional loans were obtained from respondent's stockholders and from ADM in order to carry on operations. While, on February 21, 1947, a contract was entered into between respondent, as seller, and ADM, as buyer, of the oil to be produced, it was later rescinded when Smith's attorney, Quintrell, pointed out that Smidas and not respondent was to be the legal owner of the oil. Two new contracts were

thereafter drawn . . . one between the respondent and Smidas, on March 8, 1947, and a sales contract between Smidas and ADM, dated May 26, 1947. Under the first, respondent was to manage the operations, furnish the "killer boats," hire personnel, pay all expenses and insurance, assume all the obligations of Smidas, and exonerate Smidas from liability relating to the whaling operations. Smidas, in turn, was to enter into a contract with ADM to sell it all the oil produced at $320.00 per ton and to pay the entire proceeds to respondent for services and for undertaking the burdens, expense and risks, less $25,000 which it would retain along with any selling expenses. The sales contract between Smidas and ADM provided that title pass in New York City upon the delivery of the oil.

The venture was launched. "Killer ships" were acquired, crews hired and repairs on the "Anglo Norse" made. Smith, in the United States, arranged for fuel to be delivered to the ships while at sea. The expedition began in April, 1947, and operations continued in South American fishing grounds until about January 4, 1948. The operations under Jahre's supervision produced 15,357 tons of sperm oil. Part of the oil was delivered to ADM at New York City by private transport, in October, 1947, at which time ADM paid the purchase price of $2,622,343 in the following manner: $1,429,900 was paid by ADM directly to the banker, Lazard, to discharge its lien and the balance was deposited by ADM to the respondent's account with the New York Guaranty Trust Company. On January 27, 1948, the "Anglo Norse" delivered the rest of the oil to ADM in New York and the purchase price of $2,287,668 was deposited in the New York bank account of the respondent. This account had been opened in order to pay the respondent's obligations in the United States. Another account had also been opened in a Norwegian bank. Smith could make withdrawals from the New York account but orally agreed to

first secure approval by the Norwegians. All books and records, other than those involved in the New York bank account, were kept in Norway. Four directors' meetings were held in New York City and several informal meetings in Norway.

The respondent reported net income of $810,576.38—later adjusted to $924,979.72—for the fiscal year but denied tax liability on it. The Commissioner determined a deficiency of $351,492.29. The Tax Court, however, held there was no deficiency, since Smidas was the owner of the oil sold to ADM in New York and respondent was not engaged in any substantial, regular, or continuous business activity in the United States. Four judges of the Tax Court dissented, taking the view that in reality respondent conducted the whole whaling operation and Smidas was its "mere agency or instrumentality."

The question to be determined was whether the respondent was "engaged in a trade or business within the United States" as defined in Sec. 231 (b) of the 1939 Internal Revenue Code, (26 U.S.C. 1952 ed.) which reads:

> "(b) Resident Corporations. A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14 (c) (1) and Section 15."

Most of the activities cited by the petitioner as having taken place within the United States were, in the opinion of the Tax Court, without substance including the arrangement for the discharge of the oil when it was delivered in New York, the legal services performed by Quintrell, his position as assistant secretary of the respondent, payment of obligations required to be paid in American dollars out of the bank account with the Guaranty Trust Company, or the holding of directors' meetings in New York. They were considered by it as ministerial and clerical in nature, involving little exercise of discretion or business judgment

necessary to the production of the income in question. The holding of directors' meetings in New York were solely, it was said, for the personal convenience of the directors, with no particular consequence in any major aspect.

The Court reasoned that the fact that the whaling enterprise was under the management of the respondent at the time the oil was delivered was not enough to require a holding that the respondent was engaged in trade or business within the United States. It contended that to be engaged in trade or business within the United States the taxpayer must, during a substantial portion of the taxable year, have been regularly or continuously transacting a substantial portion of its ordinary business in this country, and this the respondent did not do. The respondent is therefore, not a resident foreign corporation engaged in trade or business within the United States and not taxable as provided in Section 14 (c) (1) and 15 of the Internal Revenue Code of 1939.

The four dissenting Tax Court judges disagreed. They relied upon holdings wherein the Supreme Court has repeatedly taken the position that the incidence of taxation depends upon the substance of a transaction and not its form. *Gregory* v. *Helvering*, 293 U.S. 465, *Commissioner* v. *Court Holding Company*, 324 U.S. 331, and *Griffiths* v. *Commissioner*, 308 U.S. 355. They relied on the observation of the Supreme Court in the latter case: "We cannot too often reiterate that taxation is not so much concerned with the refinements of title as it is with actual command of the property taxed, the actual benefit for which the tax is paid" and on the reasoning of the Supreme Court in *Corliss* v. *Bowers*, 281 U.S. 376, 378. The dissenters deemed it clear that in reality the respondent conducted the whole whaling operation and the sale of the oil and that Smidas was a "mere agency or instrumentality" used by the respondent for chartering the "Anglo Norse." They point out that the respondent assumed all the obligations

of Smidas under the charter party, procured the "killer boats," outfitted each vessel, hired all necessary personnel, procured the insurance, conducted the whaling operations, paid all expenses, delivered at least a part of the oil and directly received the proceeds from the sale of the oil. Whereas, in form, the contract provided that the respondent would manage, finance and operate the expedition for Smidas, the respondent received payment of the entire proceeds from the sale of the oil except $25,000 which would be retained by Smidas. In reality, it was the respondent which received all the proceeds and paid Smidas for what appears to have been merely entering into the charter agreement. All the oil was sold in the United States and since the delivery and sale of products are the most important functions of a business for profit, it is clear that the respondent was engaged in trade or business within the United States within the meaning of Section 231 (b) of the Internal Revenue Code of 1939 and, therefore, taxable upon income from sources within the United States.

I agree with the reasoning of the dissenting judges. To it, I may add that the whole enterprise was a unified venture by which Smith, as the dominating spirit, sought and succeeded in obtaining sperm oil for ADM without which the economic status of ADM would be greatly jeopardized. To this end, Smith interested the Norwegian whaling interests and when faced by an impasse in respect to the charter of the "Anglo Norse," and after refusal of ADM to act as the charter party, secured the assistance of one of his own corporations, Smidas. The result was the delivery of processed oil finally to ADM though preliminary agreements indicated a differing program, directed to the same end. It is idle in considering what is meant by being "engaged in trade or business within the United States" to submit an enterprise to the test of whether the activity is normal, regular, or continuous in other enterprises in

ordinary times. By its very nature, the present venture contemplated a "one shot" operation with substantial profits envisioned by the unusual circumstances that existed in an abnormal time.

We had occasion in *Commissioner of Internal Revenue* v. *Ashland Oil & R. Co.*, 99 F. 2d 588, to study the problem of the relationship between form and substance in tax cases in a different environment, where we concluded that: "The question remains, however, whether if the entire transaction, whatever its form, was essentially in intent, purpose and result, a purchase by Swiss of property, its several steps may be treated separately and each be given an effect for tax purposes as though each constituted a distinct transaction. . . . the courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole, and closely related steps will not be separated either at the instance of the taxpayer or the taxing authority."

It is true that we are dealing with just one sale involving two deliveries of oil to the United States. It must be noted that the transaction in the United States was the culmination of all of the respondent's business activity. It involved an expedition which was at sea for over nine months, produced 15,357 tons of sperm oil, a purchase price of over three million ($3,000,000) dollars, and a net income of $924,979.00. These end results were brought about by the sale in the United States which accounted for over 90% of respondent's total income for the tax year. I conclude that all activities ending in the resulting sale in the United States constituted the respondent being engaged in trade or business within the United States under Section 231 (b) I. R. C.

I believe the decision should be reversed and the cause remanded for a determination of the amount of income attributable to sources within the United States within Section 231 (c) I. R. C.

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No. 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

DAYTON RUBBER COMPANY, *Petitioner*

v.

GOODMAN ASSOCIATES, INCORPORATED

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

PHILIP C. EBELING
Pickrel, Schaeffer & Ebeling
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner

Press of Byron S. Adams, Washington, D. C.

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IN THE

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OCTOBER TERM, 1960

No. 324

DAYTON RUBBER COMPANY, *Petitioner*

v.

CORDOVAN ASSOCIATES, INCORPORATED

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

While there are many statements in respondent's brief in opposition to the petition for certiorari to which we take exception, we propose to limit this reply to comment on the very recent decision of the Sixth Circuit in *Commissioner* v. *Spermacet Whaling & Shipping Co.*, S/A— F. 2d —, (August 10, 1960) (See Resp. Apdx. pp. 1b-19b), which respondent has brought to this Court's attention.

The sole question raised in Dayton's petition for certiorari was whether or not the Court of Appeals for the Sixth Circuit erred in failing to apply the "clearly erroneous" test of Rule 52 to a critical finding of the

District Court. Stated more explicitly, the question presented was whether the court below erred when it held that the finding in question was "actually an inference or conclusion drawn from the facts with which" the court was "free to disagree" without regard to or, as the court said, "uninhibited by the 'clearly erroneous' test of Rule 52. . . ." (Pet. Apdx. p. 15a)

The opinion in the instant case was handed down by the Sixth Circuit on June 6, 1960. On June 13, 1960, this Court rendered its decision in *Commissioner* v. *Duberstein*, — U.S. —, and, in the course of that decision, reiterated its position as to the application of the clearly erroneous test and particularly its application to inferences.

Respondent, in its brief in opposition, points out (Resp. Br. pp. 10-11) that on August 10, 1960, the Court of Appeals for the Sixth Circuit decided *Commissioner* v. *Spermacet Whaling & Shipping Co.*, S/A, (— F. 2d —) (see Resp. Apdx. pp. 1b-19b) and that "[i]n the course of that opinion, Judge Miller took explicit note of the alleged conflict of which petitioner complains. He [Judge Miller] then cited and quoted from the opinion of this Court in the *Duberstein* case that 'factual inferences from undisputed basic facts' receive the protection of Rule 52(a), F.R. Civ. P. Judge Miller recognized the *Duberstein* decision as settling any conflict concerning factual inferences, whether they be ultimate facts or not, drawn by a trial court from undisputed basic or evidentiary facts." (See Resp. Apdx. 6b-8b)

In view of this recent decision, respondent argues that "[i]t thus appears that the *Duberstein* case is hav-

ing exactly the effect in the Sixth Circuit petitioner claims it should have . . ." Consequently, respondent believes that "there is no need for this Court to reiterate its stand again, twice within the same six-month period, on the same issue . . ." (Resp. Br. p. 11)

In response to respondent's argument, we would point out that while the *Duberstein* decision may have had the effect in the Sixth Circuit that respondent claims, this does not gainsay the fact that in the instant case the Sixth Circuit did not follow applicable principles of law. The mere fact it recognized those principles, on August 10, 1960, furnishes no reason why this petitioner should not be accorded a review in accordance with the applicable principles which had been previously announced by this Court in several important cases, including *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275-276; and *McAllister* v. *United States*, 348 U.S. 19, 20.

Respondent speculates that the result in this case would be the same whether the Court of Appeals applied the clearly erroneous test or not (Resp. Br. pp. 15-17) and intimates that it actually held the finding in question to be clearly erroneous without using those exact words. We disagree because, in this particular case, the Court of Appeals specifically and explicitly stated that it was not applying the clearly erroneous test to the critical finding in question. We respectfully submit that in this regard the Court below committed error and that the case should be remanded so

that the critical finding of the District Judge may be tested in accordance with applicable principles.

Respectfully submitted,

PHILIP C. EBELING
Pickrel, Schaeffer & Ebeling
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner